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10 Attorneys for United States of America

11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO DIVISION

14 UNITED STATES OF AMERICA,) No. CR 16-00440 WHA
15 Plaintiff,)
16 v.) **UNITED STATES' MOTION IN LIMINE NO.**
17 YEVGENIY ALEXANDROVICH NIKULIN,) **THREE RE OPENING STATEMENTS.**
18 Defendant.) Trial: March 9, 2020
19) Pretrial Conference: February 19, 2020
20) Time: 1:30 p.m.
21) Courtroom No. 12
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21 **I. INTRODUCTION**

22 Defendant Yevgeniy Nikulin is charged in an Indictment with three counts of computer
23 intrusion, in violation of 18 U.S.C. § 1030(a)(2)(C); two counts of intentional transmission of
24 information, code, or command causing damage to a protected computer, in violation of 18 U.S.C. §
25 1030(a)(5)(A); two counts of aggravated identity theft, in violation of 18 U.S.C. § 1028A(a)(1); one
26 count of trafficking in unauthorized access devices, in violation of 18 U.S.C. § 1029(a)(2); and one
27 count of conspiracy, in violation of 18 U.S.C. § 371. Defendant has indicated that he does not intend to
28 introduce any exhibits at trial and has only one potential witness, a computer forensic examiner. The

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1 United States therefore moves to preclude presentation of information in opening statements that
2 defendant does not reasonably anticipate will be supported by evidence admitted at trial.

3 **II. BACKGROUND**

4 On January 15, 2020, defendant filed a witness list indicating one potential witness, a proposed
5 expert digital forensics examiner. ECF No. 134. Defendant also filed an exhibit list indicating that he
6 does not presently have any exhibits that he intends to introduce at trial. ECF No. 135.

7 **III. ARGUMENT**

8 It is axiomatic that counsel may not reference facts in opening statement that they do not
9 reasonably anticipate will be introduced at trial. Nevertheless, defense counsel often include a recitation
10 of the defendant's personal history during opening statements that is never supported by factual
11 evidence introduced at trial. Counsel's statements may include references to the defendant's
12 background, such as his educational history and family ties, or to other "facts" about his history.

13 Defendant Nikulin's exhibit and witness lists indicate that the only potential evidence he will
14 seek to admit in this trial is expert testimony on digital forensics. Given that fact, there is no reason to
15 expect any evidence to be admitted regarding defendant's personal history. If defense counsel are unsure
16 by the time of opening statement whether they will introduce such evidence, then the Court should
17 preclude them from describing the background and personal history of the defendant during opening
18 statement.

19 **IV. CONCLUSION**

20 For all of the reasons stated above, the United States respectfully requests that the Court
21 preclude references in opening statement that defense counsel do not reasonably anticipate will be
22 supported by evidence admitted at trial.

23 DATED: January 22, 2020

Respectfully submitted,

24 DAVID L. ANDERSON
United States Attorney

26 /s/
MICHELLE J. KANE
27 KATHERINE L. WAWRZYNIAK
28 Assistant United States Attorneys